Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No.

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

GEORGE ESENSOY, *PETITIONER*,

-v.-

H.W. "BUCKY" MCMILLAN
SUE BELL COBB, PAMELA W.
BASCHAB, GREG SHAW, A. KELLI
WISE, individually and in his/her
capacity as justices of the Alabama
Court of Criminal Appeals, *RESPONDENTS*.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

# PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Does the unavailability of habeas corpus dispense with the "favorable termination requirement" in Heck v. Humphrey, 114 S. Ct. 2364 (1994)?

2. Is the Eleventh Circuit ruling, that an essential element missing from a state indictment necessarily invalidates a conviction, contrary to Alabama state law, namely, Alabama Rules of Criminal Procedure, Rule 13.5(c)(2) which clearly states otherwise?

## PARTIES TO THE PROCEEDING

Other than the individuals identified in the title page, the following individuals are party to the proceedings:

Troy King- Alabama Attorney General.

Cheairs M. Porter-Attorney for the Attorney General's Office representing the defendants.

John M. Porter-Attorney for the Attorney General's Office representing the defendants.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner, George C. Esensoy, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

## OPINION BELOW AND JURISDICTION

The ORDER/JUDGMENT of the District Court (Pet. App. 2a-3a) and denial of rehearing (Pet. App. 4a) are unpublished. The OPINION of the Eleventh Circuit Court of Appeals (Pet. App.5a-10a) and denial of rehearing and rehearing en banc (Pet. App. 11a-12a) are unpublished. The Court of Appeals issued its OPINION on January 31, 2007 and denied rehearing and rehearing en banc on June 7, 2007. This Court has jurisdiction pursuant to 28 U.S.C. 1254(1).

## CONSTITUTIONAL PROVISIONS AND STATE RULES INVOLVED

This case involves due process protection guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution. Also relevant is Alabama Rules of Criminal Procedure, Rule 13.5(c)(2) which provides in part "no charge shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, for any defect or imperfection in the charge which does not tend to prejudice the substantive rights of the defendant upon the merits".

## STATEMENT OF THE CASE

Petitioner filed a "Post-Conviction Petition For Relief"

From Judgment Or Sentence" and a "Motion For An Evidentiary Hearing" pursuant to Rule 32, Alabama Rules of Criminal Procedure, on April 20, 2005, in Cullman County Circuit Court arguing that the Petitioner's indictment was fatally flawed for failing to include the term "unlawfully" and therefore the trial court was without jurisdiction to render judgment or impose sentence. The trial court summary denied the Petition on May 27, 2007.

Petitioner appealed the jurisdictional issue to the Court of Criminal Appeals on July 13, 2005. The Court affirmed the decision of the trial court by ruling that the trafficking indictment tracked the language of the statute, Alabama Criminal Code, 1975, Section 13A-12-231 (2) and therefore was not required to contain the term "unlawfully" (Petitioner's Complaint-Exhibit 3). The Petitioner filed an "Application For Rehearing" and that to was denied by the Court on September 16, 2005.

Petitioner filed a "Petition for Writ of Certiorari" with the Supreme Court of Alabama challenging the ruling of the Alabama Court of Criminal Appeals on September 23, 2005.

Petitioner filed a Complaint for injunctive and declaratory relief in Federal District Court on November 3, 2005 alleging that the defendants denied Petitioner due process of law, guaranteed by the Fifth and Fourteenth Amendments to the U.S. Constitution, by committing perjury and obstructing justice by misrepresenting the issue raised on appeal and by ruling that the Petitioner's indictment was not required to contain the term "unlawfully". Consequently, the Petitioner was denied an evidentiary hearing. Also, Petitioner asked that the Court declare "unlawfully" as an essential element of trafficking

in coc[illegible]as publicized in Alabama Law Institute's State of Alabama Indictment and Warrant Manual and due to the fact that all trafficking indictments in the state of Alabama contain the term "unlawfully"(Pet. App. 1a-example of an actual/typical trafficking indictment from Morgan County, Alabama containing the term "unlawfully" )

The Supreme Court of Alabama denied Petitioner's Writ of Certiorari on November 11, 2005.

The Magistrate Judge sua sponte dismissed the Petitioner's Complaint due to judicial immunity and the Rooker-Feldman doctrine on December 6, 2005. The District Court adopted the Magistrate Judge's recommendation and dismissed the Petitioner's Complaint due to the Rooker-Feldman doctrine on February 22, 2006. On March 1, 2006 the Petitioner filed a "Motion to Alter or Amend Judgment Pursuant to Rule 59(e)". That motion was denied on April 18, 2006.The Petitioner appealed the decision of the District Court to the Eleventh Circuit Court of Appeals arguing the fact that Rooker-Feldman doctrine did not apply to his Complaint due to the recent ruling by this Court in ExxonMobile Corp. v. Saudi Basic Industries Corp., 125 S.Ct. 1517 (2005). The Eleventh Circuit agreed with the Petitioner but still dismissed the Complaint instead using the "favorable termination requirement" in Heck v. Humphrey, 512 U.S. 477 (1994). The Petitioner now contends that he had no other avenue available to him to vindicate his rights to due process in a state post-conviction proceeding, other than a §1983, due to the unavailability of habeas corpus for a state jurisdictional issue. Five justices on this Court in Spencer v. Kemma, 523 U.S. 1 (1998), has endorsed the notion that unavailability of habeas relief permit's a §1983 action, regardless of whether the success of the action would necessarily imply the invalidity of the conviction or sentence. Also, the Petitioner disagrees with

The Eleventh Circuit ruling that a defective indictment necessarily invalidates a conviction, a decision in conflict with Alabama Rules of Criminal Procedure, Rule 13.5 (c) (2).

## REASON FOR GRANTING THE WRIT

### I. § 1983 IS THE PETITIONER'S ONLY MEANS TO ASSERT HIS RIGHTS TO DUE PROCESS IN A STATE-POST CONVICTION PROCEEDING.

In Estelle v. McGuire, 502 U.S. 62, 67-68, this Court stated "it is not the province of a habeas court to reexamine state-court determination on state law questions". In Hunt v. Tucker, 875 F. Supp 1487 (N.D. Ala. 1995), footnote 51 states "[t]he effect of the Murphy [Murphy v. Beto, 416 F.2d 98,100 (5th Cir. 1969)] line of cases essentially is to remove from a federal habeas court the power to even consider claims that a state prisoner was convicted on a fatally defective indictment". Although federal habeas court is foreclosed from examining the sufficiency of a state indictment, this does not give the state courts unbridled power to deny its citizen due process in a state post-conviction proceeding. In Whitney v. Florida, 389 U.S. 138 (1967) Justice Douglas dissenting stated:

> "I assume that the Federal Constitution does not compel the States to provide any remedy for collateral attack of criminal convictions. Cf Townsend v. Sain, 372 U.S. 293,313 n. 9; Griffin v. Illinois, 351 U.S. 12,18. But when a State makes available a means for review, it is held to a 'constitutional requirements of substantial equity and fair process.' Anders v. California,

> [389 U.S. 138, 139] 386 U.S. 738,744." It may not discriminate arbitrarily between persons applying for relief (e.g., Burns v. Ohio, 360 U.S. 252), and it must adhere to the requirements of due process. Swenson v. Bosler, 386 U.S. 258, 260. Though these rules were primarily developed with reference to appellate review, we have held them applicable with equal force to state post-conviction proceedings. Smith v. Bennett, 365 U.S. 708."

Without a federal forum to assert ones rights is like having no rights at all. This Court must recognize the fact that the Petitioner is entitled to due process in a state post-conviction proceeding and the only avenue left for him to assert his rights is thru a § 1983. "It is unfair to require a person who is legally precluded from challenging his or her conviction or sentence on habeas grounds to demonstrate that the conviction or sentence had been overturned or invalidated." See Zupan v. Brown, 5 F.Supp. 2d 792 (N.D. Cal 1998). Consequently the unavailability of habeas corpus should be made as an exception to the Heck requirement.

**II.THERE IS A SPLIT IN THE CIRCUITS REGARDING WHETHER THE UNAVAILABITY OF HABEAS CORPUS DOES AWAY WITH THE HECK REQUIREMENT.**

First, Third, Fourth, Fifth, and Sixth Circuits do not allow §1983 claims. See Figueroa v. Rivera, 147 F.3d 77, 81 n.3 (1st Cir. 1998); Gilles v. Davis, 427 F.3d 197, 209-10 (3rd Cir. 2005); Randell v. Johnson, 227 F.3d 300, 301-02 (5th Cir. 2000); and Heuy v. Stine, 230 F.3d 226, 229-30 (6th Cir. 2000).Whereas the Second, Seventh, and Ninth

Circuits do allow § 1983 claims. See Huang v. Johnson, 251 F.3d 65, 75 (2nd Cir. 2001); DeWalt v. Carter, 224 F.3d 607, 617-17 (7th Cir. 2000); and Nonnette v. Small, 316 F.3d 875-77 & n.6 (9th Cir. 2002).

**III. THIS COURT HAS IN PRINCIPLE DECIDED IN SPENCER v. KEMMA, 523 U.S. 1 (1998), THAT UNAVAILABILITY OF HABEAS CORPUS DOES AWAY WITH THE HECK REQUIREMENT.**

Justice Souter, Justice O'Conner, Justice Ginsburg, Justice Breyer and Justice Stevens in Spencer v. Kemma, 523 U.S. 1 (1998) agreed with the proposition that unavailability of habeas corpus does away with the Heck requirement.

**IV. THE ELEVENTH CIRCUIT RULING, THAT AN ESSENTIAL ELEMENT MISSING FROM AN INDICTMENT NECESSARILY INVALIDATES A CONVICTION, IS IN CONFLICT WITH ALABAMA RULES OF CRIMINAL PROCEDURE, RULE 13.5 (c) (2).**

A.R.C.P. Rule 13.5 (c) (2) in part states "no charge shall be deemed invalid, nor shall the trial, judgment, or other proceedings thereon be stayed, arrested, or in any manner affected, for any defect or imperfection in the charge which does not tend to prejudice the substantial rights of the defendant upon the merits." All that the defendants ruled on was that "unlawfully" was not a necessary element in the state indictment (see Complaint, Exhibit 3). Success in federal court would require a further determination to see whether Petitioner's substantial rights were violated. That's why in the Complaint under "Injuries Suffered", see Complaint ¶ 24, the Petitioner stated that he was denied an "evidentiary hearing" due to the unconstitutional actions of

the defendants because that is the only relief that was possible. So a defect in an state indictment is subject to harmless error analysis and does not necessarily invalidate a conviction. Petitioner alleged in his Rule 32 Petition that "unlawfully" does make a difference in his case because the jury was charged with complicity and the co-defendant's cases were dropped after the Petitioner's trial, see Complaint. Clearly, as alleged, he was working for the state and therefore committed no crime. As the Court can see an evidentiary hearing is needed to establish the facts in the case. Consequently Heck's "favorable termination requirement" does not apply to the Petitioner's Complaint.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

George Esensoy

George C. Esensoy, pro se
7601 Foxfire Dr.
Huntsville, Al 35802

COUNT IV

The Grand Jury of said County further charges that before the finding of this indictment, Maria Chavez and Ubaldo Chavez, whose names are to the Grand Jury otherwise unknown, did, knowingly and **unlawfully** possess actually or constructively on, to-wit: January 27, 1999, in or near Decatur, Morgan County, Alabama, quality of cannabis in excess of 2.2 pounds, but less than 100 pounds, in violation of Section 13a-12-231 of the Code of Alabama.

Against the peace and dignity of the State of Alabama.

/s/Bob Burrell
BOB BURRELL
District Attorney
Eight Judicial Circuit

APPENDIX-2a

Filed 2/22/06

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

GEORGE ESENSOY, PLAINTIFF,

CIVIL COMPLAINT
v. CASE NO. 2:05:CV-1063-WKW(WO)

H.W "BUCKY" MCMILLIAN, et al., DEFENDANTS.

**ORDER**

On December 6, 2005, the Magistrate Judge filed a Recommendation (Doc #7) in this case, finding that the plaintiff's complaint is due to be dismissed on the grounds of judicial immunity and under the Rooker-Feldman doctrine. The plaintiff filed an objection on December 16, 2005 (Doc#13). After an independent and de novo review of the record, the court finds that, pursuant to the Rooker-Feldman doctrine, it does not have jurisdiction in this matter.

It is therefore ORDERED that:

1. The objection (Doc #13) is OVERRULED.
2. The Recommendation of the Magistrate Judge (Doc#7) is ADOPTED.
3. The plaintiff's Motion to Correct Clerical Error (Doc #14) is GRANTED.
4. This case is DISMISSED with prejudice for lack of subject matter jurisdiction.

Done this the 22nd day of February, 2006.

/s/W. Keith Watkins
United States District Court Judge

APPENDIX-3a

Filed 2/22/06

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

GEORGE ESENSOY, PLAINTIFF,

CIVIL COMPLAINT
v. CASE NO. 2:05:CV-1063-WKW(WO)

H.W "BUCKY" MCMILLIAN, et al., DEFENDANTS.

**JUDGMENT DISMISSING COMPLAINT**

In accordance with the order entered on this date, it is the ORDER, JUDGMENT and DECREE of this court that this action is DISMISSED with prejudice.

DONE this the 22nd day of February, 2006.

/s/W. Keith Watkins
United States District Court Judge

APPENDIX-4a

Filed 4/18/06

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA

GEORGE ESENSOY, PLAINTIFF,

CIVIL COMPLAINT
v. CASE NO. 2:05:CV-1063-WKW(WO)

H.W "BUCKY" MCMILLIAN, et al., DEFENDANTS.

**ORDER DISMISSING MOTION TO AMEND OR ALTER JUDGMENT**

This cause is before the Court on plaintiff's Motion To Alter or Amend Judgment Pursuant to Rule (59e)(Doc #18), filed on March 1, 2006. Upon consideration, it is hereby ORDERED that the motion is DENIED.

DONE this the 18th day of April, 2006.

/s/W. Keith Watkins
United States District Court Judge

Filed-1/31/07

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGE ESENSOY, PLAINTIFF-APPELLANT,

No. 06-12580
D.C. No. 05-01063-CV-W-N

-v.-

**OPINION AFFIRMING DISMISSAL OF COMPLAINT**

H.W. "BUCKY" MCMILLAN
SUE BELL COBB, PAMELA W.
BASCHAB, GREG SHAW, A. KELLI
WISE, individually and in his/her
capacity as justices of the Alabama
Court of Criminal Appeals, DEFENDANTS-
APPELLEES.

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Appeal from the United States District Court for the
Middle District of Alabama

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Before EDMONDSON, Chief Judge, ANDERSON
and BIRCH, Circuit Judges

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PER CURIUM:

George Esensoy ("Appellant"), a state prisoner proceeding pro se, appeals the district court's dismissal for lack of subject matter jurisdiction of his 42 U.S.C. § 1983 civil complaint seeking declaratory and injunctive relief. Although the district court may have applied the Rooker-Feldman[1] doctrine prematurely, we affirm the district court dismissal because Appellant's claims are barred under Heck v.Humphrey, 114 S. Ct. 2364 (1994).

Appellant was convicted of trafficking cocaine in Alabama state court and received a sentence of 30 years' imprisonment. On direct appeal, the Alabama Court of Criminal Appeals affirmed the conviction, and the Supreme Court of Alabama denied certiorari. Appellant later filed a petition for relief in the state trial court,[2] claiming his criminal indictment was defective because it did not include the term "unlawfully," which Appellant argues is an essential element of his crime. After the state trial court denied the petition, Appellant appealed to the Alabama Court of Criminal Appeals, which affirmed the denial of the petition and

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[1] The Rooker-Feldman doctrine generally "provides that the federal courts, other than the United States Supreme Court, have no authority to review the final judgments of state courts." Siegel v. LePore, 234 F.3d 1163, 1172 (11th Cir. 2000).

[2] Appellant filed an Ala. R. Crim. P. 32 Post-Conviction Petition for Relief from Judgment or Sentence and a Motion for an Evidentiary Hearing, both of which the state trial court denied.

later denied Appellant's application for rehearing.[3] The Supreme Court of Alabama then denied Appellant's certiorari on 11 November 2005.

Eight days earlier, on 3 November 2005, Appellant filed a pro se § 1983 action in federal district court action in federal district court against the five judges (1) "committed perjury and obstructing justice" by not correctly identifying Appeallant's argument on appeal; and (2) conspiring to violate Appellant's due process rights by failing to declare that the term "unlawfully" was a necessary element of his crime that should have been included in the indictment.[4] The district court adopted the report of the magistrate judge, which recommended that the district court dismiss Appelant's complaint sua sponte on two grounds: (1) lack of subject matter jurisdiction under the Rooker-Feldman doctrine; and (2) judicial immunity.[5] After

[3] The Alabama Court of Criminal Appeals determined that because the language of the indictment tracked the language of the trafficking statute, the indictment was therefore valid.

[4] In Appellant's complaint he seeks (1) a declaration that the Defendant's violated his due process rights; (2) a declaration that "unlawfully" is an essential element of his offense; and (3) injunctive relief entitling him to an evidentiary hearing in state court to prove that failure to include the term "unlawfully" in his indictment deprived the state court of jurisdiction to render judgment.

[5] Because Appellant did not ask for damages, judicial immunity protects Defendants in this case only to extent Appellant requests injunctive relief. In Pulliam v. Allen, 104 S. Ct. 1970 (1984), the Supreme Court concluded that judicial immunity is not a bar to demands for injunctive relief against state judges. Congress abrogated Pulliam,

an independent review, the district court determined that it lacked subject matter jurisdiction under the Rooker-Feldman doctrine and dismissed the complaint with prejudice.

We review a district court's determination that it lacks subject matter jurisdiction de novo. Singleton v. Apfel, 231 F.3d 853,856 (11th Cir. 2000).

We are inclined to believe that dismissal is improper under the Rooker-Feldman doctrine. But Appellant's claims are barred by Heck v. Humphrey, 114 S.Ct. 2364 (1994), and we affirm on that basis. In Heck, the Supreme Court concluded that in a § 1983 action, if a judgment in favor of a state prisoner "would necessarily imply the invalidity of his conviction or sentence...the complaint must be dismissed unless the [prisoner] can demonstrate that the conviction or sentence has already been invalidated." Heck, 114 S. Ct. at 2372.[6] We have said "declaratory or injunctive relief claims which are in the nature of habeas corpus claims–i.e., claims which challenge the validity of the claimant's

declaratory relief was unavailability." Because Appellant specifically requests declarative relief, judicial immunity protects the Defendants only from Appellant's request for injunctive relief. But § 1983 does not explicitly bar Appellant's request for declaratory relief.

[6]Although the plaintiff in Heck sought only damages, the Supreme Court has said that dismissal under the principles announced in Heck may be appropriate regardless of the kind of relief sought. Wilkinson v. Dotson, 125 S. Ct. 1242, 1248 (2005).

conviction or sentence and seek release--are simply not cognizable under §.1983." Abella v.Rubino, 63 F.3d 1063, 1066 (11th Cir. 1995).[7]

In this case, recognizing Appellant's claims as cognizable would necessarily imply the invalidity of his conviction because it would undermine the validity of the underlying indictment. The basis of Appellant's claims against the judges of the Alabama Court of Criminal Appeals is that refuse to declare that the term "unlawfully" was an essential element of his offense and that his indictment was therefore defective. What Appellant essentially seeks by filing this § 1983 action is for a federal court to exercise direct appellate over state criminal courts. Appellant specifically asks for a federal district court to declare that "unlawfully" was an essential element of his state criminal offense and that he is entitled to a hearing in state court to prove his legal theory. Granting such relief would contradict the purpose of the rule in Heck: "to limit the oppurtunities for collateral attacks underming the finality of criminal proceedings and may create conflicting resolutions of issues." Id at 1065 (citing Heck, 114 S. Ct. at 2371).

[7] In Abella, we applied Heck to a Bivens claim against federal judges and officials for conspiracy to convict and concluded that a judgment in favor of the prisoner would necessarily imply that the prisoner's conviction was invalid. Abella, 63 F.3d at 1063, 1065-66.

"[W]e may affirm the district court as long as the judgment entered is correct on any legal ground regardless of the grounds addressed, adopted or rejected by the district court." Ochran v. United States, 273 F.3d 1315, 1318 (11th Cir. 2001)(citation and quotation marks omitted). Because Appellant's §1983 claim would necessarily imply the invalidity of his conviction and because Appellant cannot demonstrate that his conviction has been invalidated, Appellant's claims are barred under Heck. Therefore, the district court's judgment dismissing Appellant's complaint is

AFFIRMED.

Filed-6/7/07

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGE ESENSOY, PLAINTIFF-APPELLANT,

No. 06-12580
D.C. No. 05-01063-CV-W-N

-v.-

**DENIAL OF REHEARING AND REHEARING EN BANC**

H.W. "BUCKY" MCMILLAN
SUE BELL COBB, PAMELA W.
BASCHAB, GREG SHAW, A. KELLI
WISE, individually and in his/her
capacity as justices of the Alabama
Court of Criminal Appeals, DEFENDANTS-
APPELLEES.

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Appeal from the United States District Court for the
Middle District of Alabama

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Before EDMONDSON, Chief Judge, ANDERSON
and BIRCH, Circuit Judges

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PER CURIAM;

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested hat the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Edmondson
CHIEF JUDGE